per pound—not even yield enough to pay expenses already incurred—and therefore, and looking to your Lordship's observations on the 103rd section of the Bankrupt Statute as obviating the Lord Ordinary's suggestion of some available estate arising, I think the arrestment here cannot be sustained as effectual; at present there is nothing to attach.

LORD SHAND—Having had the advantage of further discussion and of the opinions that have just been delivered, I am now disposed to think that the pursuers have failed to prove that there are funds or effects attached by their arrestment sufficient to subject the defenders to the jurisdiction of this Court.

I am still of opinion that the defenders have a contingent claim on the estate of Lindsay which might found an arrestment. The moment such a claim as is made by the pursuers here, and is threatened by Mackie, Koth & Co., who supplied the defenders with another cargo of coals through Lindsay, is made against the defenders, they, as they have already settled with Lindsay for these coals, are entitled to demand that funds should be set aside from Lindsay's estate to await the issue of this case.

On the second point I quite agree with the distinction your Lordship has pointed out between the liability of the bankrupt's trustee and that of the primary debtor; still, if it appeared that the trustee was vested in any estate, I think an arrestment would attach the funds in his hands which he is bound to divide among the bankrupt's creditors. But I find that the trustee is not vested in any estate which can yield him funds to divide, and to that fact I think sufficient weight was not given. I am therefore prepared to agree with your Lordships.

The Court pronounced the following interlocutor:—

> The Lords having heard counsel on the reclaiming note for the defenders against Lord Shand's interlocutor of 6th July 1876, Recal the interlocutor: Sustain the first plea-in-law stated for the defenders: In respect thereof dismiss the action, and decern: Find the defenders entitled to expenses, and remit to the Auditor to tax the account thereof, and report."

Counsel for Pursuers—J. G. Smith. Agent—Alexander Gordon, S.S.C.

Counsel for Defenders—Lord Advocate (Watson)—M'Laren. Agent—P. Morison, L.A.

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*Friday, February 2.*

## FIRST DIVISION.

[Lord Young, Ordinary.

## PEGLER *v.* THE NORTHERN AGRICULTURAL IMPLEMENT AND FOUNDRY COMPANY.

*Contract—Master and Servant—Salary—Defence—Compensation.*

A person agreed in writing to serve a company "as general manager of their business." He was to "have the full control and direction of it, subject always to such general and special instructions and directions in regard to his duties of manager as the company might see fit to give through their board of directors." After acting for about fourteen months, he gave the company three months' notice of leaving, under the agreement, but when the time came, at their request he continued in their employment for two months longer. No complaint was ever brought against him. To an action for payment of salary the company stated in defence that the pursuer had neglected to keep regular books in terms of his undertaking, and to account for his intromissions, and that there were sums belonging to them in his possession unaccounted for to an amount exceeding his claim.—*Held* that, as the duties, neglect of which was alleged, were outwith the agreement, and as there was no averment that the pursuer was bound by the agreement to account for his intromissions, the defences could only be pleaded as compensation, and as such were not relevant defences to a liquid claim for salary—*diss.* Lord Shand, who held that the question was one of pleading only, and as such should upon equitable grounds be entertained.

*Observed* by Lord Deas, that the rule by which illiquid claims cannot be set up as a defence against liquid claims is founded upon natural justice, and is intended to prevent debtors from postponing the enjoyment by others of money to which they are legally entitled.

A minute of agreement, dated 22d June 1874, between the Northern Agricultural Implement and Foundry Company, of the first part, and Thomas Boyne Pegler, of the second part, bore—"*First*, The said party of the second part shall serve the parties of the first part as general manager of their business, and shall have the full control and direction of said business, subject always to such general and special instructions and directions in regard to his duties as manager as the said parties of the first part may see fit to give through their board of directors or any committee of said board. *Second*, The said parties of the first part shall pay to the said party of the second part, as remuneration for his services as manager foresaid, a salary at the rate of £200 sterling per annum, payable quarterly, afterhand. *Third*, The said parties of the first part shall forthwith allot to the said party of the second part fifty shares of the capital stock of the said Northern Agricultural Implement and Foundry Company, Limited; and the said party of the second part shall accept the same, and shall, immediately on the execution thereof, pay to the credit of the first parties with the Caledonian Banking Company, Inverness, the sum of £500 sterling, as the price of said shares so to be allotted to him. The said shares shall be held to be, and shall be, fully paid-up shares of the Company, the amount paid on which in advance of calls shall bear interests out of the profits of the Company at the rate of five pounds per centum per annum aye and while the same is in advance of calls; and the amount paid on which not in advance of calls shall receive such ordinary dividends as may from time to time be declared on the called-up capital of the Company. *Fourth*, In the event of the said

party of the second part ceasing to be in the employment of the said parties of the first part, he shall be entitled to require them to purchase and take over from him twenty-five of said shares so to be allotted as aforesaid, and that at the price of ten pounds per share, provided always such requirement be made and intimated in writing within the period of three months from and after such event. *Fifth*, The said party of the second part shall be bound and obliged to devote his whole time and attention to the duties of the office of manager for the parties of the first part; and shall not, by himself or others, either directly or indirectly, engage in any other business, or exercise any other office whatsoever." *Lastly*, the pursuer was to be held to have entered on his engagement upon 8th June 1874, and it was to subsist until put an end to by one or other of the parties on giving three months' notice in writing to the other.

The shares were allotted in terms of the contract, and the pursuer entered upon his employment on the date named. In August 1875 he sent the defenders a letter giving notice of his intention to leave their service upon the 16th November following, and requiring them then to take up the 25 shares allotted to him. But he afterwards, on their request, continued with the defenders till 20th January 1876. This was an action for payment of the salary, amounting to £72, 4s. 6d., due to him from 8th September till 20th January 1876, and for payment of £250, the price of the shares allotted to him, with interest upon both sums from the date of citation.

The pursuer condescended upon the terms of the contract, and further averred—"Following up the intimation contained in the letter quoted in the preceding article, the pursuer intended to leave the employment of the defenders on the 16th of November 1875; but at the special request of the defenders, as they, as was represented to him, had not then succeeded in getting another manager, he continued in their employment till 20th January 1876. During the currency of his employment the defenders made no complaint to the pursuer of any failure in duty or breach of agreement on his part." To this averment the defenders answered—"Admitted that in January 1876 the pursuer left Inverness. The defenders' statement is referred to. *Quoad ultra* not admitted."

The defenders' statements and the pursuer's answers thereto, so far as material, were to the following effect—"(Stat. 1) The pursuer was engaged as general manager of the defenders' Company, and had the sole control of their business and property from the 8th June 1874 till he left Inverness in January 1876. It was the pursuer's duty, *inter alia*, to keep regular books recording, *inter alia*, the work done and the cost of the articles produced at the Company's works, and the whole transactions of the Company's business. A system of book-keeping fitted to secure these objects was arranged and prescribed to him, and he professed to keep the Company's books on said system. It was also the pursuer's duty to keep himself informed as to the progress of the Company's business, and to inform the directors if the business was proving unsuccessful. The statements in the answer are denied. (Ans. 1) Admitted that the pursuer was engaged as general manager of the Company, and that he had in that capacity, and under the supervision of the directors, a control, but not the sole control, of their business during the period of his employment. Admitted that as manager it was the pursuer's duty to keep himself informed as to the position of the Company's business, and to communicate with the directors relative thereto. *Quoad ultra* denied, and it is explained and averred that the pursuer, who is an engineer and practical mechanist, never undertook or professed to keep the defenders' books, and it was no part of his duty to do so. The books were kept by another person, employed for that purpose. The directors were fully informed as to the state of the Company's affairs. (Stat. 2) The pursuer, in breach of his duty to the defenders, failed to keep or cause to be kept regular books, either on the prescribed system or any system. He also failed to keep the directors informed as to the state of the business, having repeatedly assured them that the business was prosperous and being conducted at a profit, when the fact was, as he knew, or might easily have ascertained, that it was being conducted at a very heavy loss. So soon as the directors of the Company ascertained that the business was being conducted at a loss, they complained to the pursuer of the manner in which it had been managed by him. (Ans. 2) Admitted that the pursuer did not keep the books. Denied that this was a breach of his duty. Admitted that the business was carried on at a loss. *Quoad ultra* denied. The directors made no complaint to the pursuer regarding his management during the time that he was in their employment, although they were aware, or had the means of knowing, that the business had proved unsuccessful."

It was further stated by the defenders that a balance-sheet made up at the end of 1875 showed an apparent loss upon the Company's business of £1971, 15s. 1d. Further, they had requested the pursuer to make up a statement showing how the loss had occurred. "The pursuer, however, in place of doing so, left Inverness without any further communication with the defenders, and merely transmitted a memorandum professing to account for the loss to the extent of about £800. The defenders have been unable to obtain from him any further explanation of the deficiency, and on referring to the books left by him it appeared that they had not been kept in the manner prescribed, or so as to show how the said deficiency arose. The defenders, notwithstanding of the pursuer's neglect of duty foresaid, were ready and willing to settle with the pursuer for the salary due to him, and to take over the half of his shares at the price paid for them on his implementing his part of the agreement by rendering a proper account of his intromissions and management. The pursuer, however, having failed to do so, the defenders are not aware to what extent the foresaid deficiency of £1971, 15s. 1d. is one for which the pursuer is reponsible, and they decline to settle with the pursuer till the matter is cleared up. The defenders believe and aver that on a just accounting it will be found that nothing is due by them to the pursuer."

The defenders pleaded, *inter alia*,—"(1) The pursuer having failed to perform his duties under the said agreement, and, in particular, having failed to keep proper books and to render a proper account of his intromissions and management, the action cannot be maintained."

The Lord Ordinary pronounced an interlocutor giving decree in terms of the conclusions of the summons, with the exception of the claim for interest, which was withdrawn in terms of a minute lodged by the pursuer.

The defenders reclaimed, and during the hearing of the case they were allowed to make additional averments, in which they detailed more specially the circumstances connected with the pursuer's failure to keep regular books, as they alleged he had undertaken to do. In particular, they averred "that the pursuer has monies belonging to them in his hands to the extent of not less than £1200, he having failed to account for money received, material, and men's time to at least that amount. The defenders have raised an action of count and reckoning concluding against the pursuer for the same."

The defenders argued—The salary claimed had not been earned. It was the duty of the pursuer to keep the books of the company and to account, both of which he had failed to do. There were sums in his hands unaccounted for more than equal to what was due as salary. It was a mutual contract, and averment of failure by the pursuer to implement its obligations was a good ground of defence, and should be remitted to probation.

Authorities—*M'Bride* v. *Hamilton*, June 11, 1875, 2 Rettie 775; *Taylor* v. *Forbes*, December 2, 1830, 9 S. 113; *Scot. North-Eastern Railway Company* v. *Napier*, March 10, 1859, 21 D. 700; *Tait* v. *M'Intosh*, February 26, 1841, F.C.; *Fraser* v. *Lang*, February 10, 1831, 9 S. 418; *Johnston* v. *Robertson*, March 1, 1861, 23 D. 646.

At advising—

Lord President—It is quite clear in this case what were the terms upon which the pursuer entered upon his employment, what was the rate of remuneration, and what the period of service. He was to be entitled to put an end to the contract on giving three months' notice. This he did on 16th August 1875, when he addressed to the defenders a letter in which he gave notice of his intention to leave their service on 16th November. He adds—"I shall require you to take up twenty-five shares in the said Company on the said date, according to article 4 in the said agreement." Now, had this notice been accepted and acted on there could have been little doubt that as at 16th November 1875 the claims made by the pursuer for the value of the shares in this action would have been perfectly liquid claims—that is to say, that the pursuers' right to recover was liquidated by the notice, and the amount is not doubtful. The right to wages was also liquidated by the notice, because the salary was fixed and is not disputed. But the defenders were not willing to let him go on 16th November. He was entitled to do so, but by arrangement he remained. He accordingly avers "that at the special request of the defenders as they, as was represented to him, had not then succeeded in getting another manager, he continued in their employment till 20th January 1876." Now, this is a precise averment on the part of the pursuer, and it is not met in such a way by the defenders that they are entitled to say that they do not admit it. The averment that the pursuer remained at their special request in their employment is a fact within the defenders' own knowledge, and they were bound either to admit or deny it; and their not having done so must be taken as a confession of fact that it was at their request he entered in their employment. The claims of the pursuer thus became liquid on the 16th of November, and the defenders were then bound to pay. The only reason why they did not pay was that the pursuer was requested by them to remain. The money has not been paid, and on 16th March 1875 the pursuer brought the present action.

Now, the first defence stated (for it is not disputed that the sum of £250 is due under the contract) is that the pursuer undertook to do something for the defenders which he has failed to do, and that he is therefore not entitled to recover his claims under the contract. The awkwardness of their defence at first sight is, that it stands on the bare averment of the defenders. If it had been averred that there was a distinct agreement, even a verbal agreement, to alter or add to the written contract, there might have been a difficulty in disregarding it. But I do not so read the averment. The averment is that the pursuer undertook something not in the written contract, viz., that he undertook and professed to keep the Company's books. He was not bound to do so under the written contract, and it is not relevant to say that he undertook to do something which was outside that contract. But being under no obligation to keep books, nevertheless he did so, say the defenders, and having failed in it he is not entitled to recover his claims under the contract.

I think this contention of the defenders is bad. If there had been an allegation that the pursuer had failed to do something which he was bound to do under the contract, that might have brought the case under the rules of the recent cases of *Johnston* v. *Robertson* (March 1, 1861, 23 D. 646) and *Macbride* v. *Hamilton*, (June 11, 1875, 2 Rettie 775). But there is no such averment. In *Johnston* v. *Robertson* there was a distinct averment of a breach of one of the articles of the written contract. In *Macbride* v. *Hamilton*, although no precise clause in the written contract could be founded on in defence, and no allegations of a breach of such a clause could effectually be made, yet there was a distinct allegation of breach of contract, in so far as the clause of the contract specifying the time when it was to be executed had been departed from, and that another period had been substituted by a subsequent verbal agreement. But in the present case there is no allegation of a subsequent agreement, and therefore, in my opinion, the amendment which has been made does not come up to an averment of breach of contract entitling the defenders to refuse to pay the pursuer's claims.

But there is another allegation, to the effect that the pursuer in the course of his employment had sums of money in his hands belonging to the defenders, and that he has failed to account for these. Even after the amendment has been made, the averment is not specific. Without the amendment there was no averment of a claim against the pursuer at all, and as it now stands, in the absence of any averment that the pursuer was bound to account for his intromissions and failed to do so, there is no breach of the contract averred. In point of fact and law this amounts to nothing more than a plea of compensation, labouring under the disadvantage that it was

plainly an after-thought. When the record was closed there was no such allegation. There is nothing in the written contract on the matter of accounting. Of course when a man intromits with funds belonging to another there is an obligation at common law to account. But failure to account, when pleaded in defence, is nothing more than a plea of compensation. It is quite settled that it is only against an illiquid claim that a plea of compensation may be set up.

I am of opinion that both these defences fall to be repelled, and that the pursuer is entitled to decree in terms of the conclusions of the summons.

Lord Deas—I am entirely of the opinion expressed by your Lordship. Apart from the question about the relevancy of the defence, I am of opinion that the pursuer is entitled to decree for both the salary and the price of the shares. These are both liquid claims upon the face of the contract. The stipulation that when the connection between the pursuer and the defenders ceased they were to relieve him of the shares, came into operation when the pursuer left them in January 1876. He had given three months' notice of his intention to leave on 16th November 1875, and he remained at the request of the defenders until January following. It is not disputed that he was entitled to leave their service in November, and I do not think it can be disputed. He was also entitled to his salary and to his other claim up to that time. The events had occurred which liquidated these claims.

The rule that illiquid claims cannot be set up in defence against liquid claims is founded upon natural justice, and is intended to prevent debtors from postponing the enjoyment by other parties of money to which they are legally entitled. Any pretence of claims set up might keep a person out of his just rights until he was ruined. The case of a salary is as strong an instance of the justice and necessity of enforcing such a rule as can be found. I do not say there may not be exceptional cases in which a relaxation of that rule is allowed; but if that is to be contended for, the party must show some strong equitable ground. There is no such ground here. All the circumstances point the other way.

The summons was signeted upon the 16th March 1876. The record was closed upon 9th June, and decree was given against the defenders upon the 14th June. A reclaiming note was presented to this Division, and the case was debated upon 11th January of this year. It then turned out that there was no relevant defence stated, and an amendment was allowed. There was there for the first time stated a defence which is at all like a relevant one. A counter action has been raised, but it has not been served. I cannot conceive a stronger case for enforcing a claim of the kind. A man is not to be kept out of money due him by defences got up *ex post facto*, and there is here a strong presumption that they are not well founded. I cannot understand how there can be any difficulty in applying the rule in this case.

This is not a question of pleading, or whether the action is to be conjoined with a counter-action, or postponed. The view I take is founded upon much deeper principles. There is here no *prima facie* evidence that the claims set up in defence are good. If the defenders have anything favourable in their case it will be dealt with in the counter-action, where a remedy will be open to them. It would be a perversion of justice to have the pursuer's case postponed till the after-thoughts of the defenders are disposed of.

Lord Mure concurred.

Lord Shand—I differ in opinion from your Lordships. I think the defences are relevant as an answer to the pursuer's claim, and that the defenders should be allowed a proof in support of their averments.

The question, it appears to me, is one of pleading, and of pleading only. There can be no doubt that the defenders in an action at their own instance can maintain the claim which they here state in defence. But as matter of pleading they say they are entitled to have their claims entertained and disposed of in this action as an answer to the pursuer's demands.

The action is founded on an agreement between the pursuer and defenders, and specially on the 2d and 4th articles of that agreement. The 2d article deals with the rate of remuneration which the Company were to give. The 4th article provides that the defenders shall in his option take back from the pursuer certain shares in the Company at a certain value in the event of his ceasing to be in their employment. Founding upon that agreement, the pursuer asks a balance of his wages, and that the Company shall take over the shares and pay for them. The defenders, founding also on the agreement, say that he is not entitled to these payments because he has failed to perform his duty, and they further say that he has £1200 of their funds in his hands of monies intromitted with by him in the performance of his duties under the agreement. I think it is a very strong precedent to compel the defenders to pay the pursuer's salary and the price of the shares, when they have stated in defence that the defender has funds in his hands, arising out of intromissions under the same contract, to an amount exceeding his claims. The defence is based upon the same document which is the foundation of the action.

The record, as originally presented, was no doubt loose and vague. But it is to be observed that it was only precision of averment that was wanting. The defence now maintained is not new. It was stated before the amendment was made, but it is now averred with greater precision and accuracy. Taking the case as it was presented to the Lord Ordinary, I am not prepared to say that I would have differed from his Lordship in the conclusion to which he came. But if I had agreed with him, it would have been entirely on the ground that the statements of the defenders were not precise or specific enough. The averments now made seem to me to put the matter in a different position.

I do not think this is a proper case of liquid and illiquid claims, nor is it a proper case for the application of the rules of pleading as to compensation. The defenders do not propose to mix up claims which are unconnected with each other. They seek, as I think legitimately, to have the claims of both parties under the same contract, and not those of one party only, made the subject of adjudication. The Statute 1592, cap. 141, properly comes into operation where an attempt

is made to plead compensation on a debt arising out of a different contract. I hold, as I stated in the case of *Macbride* v. *Hamilton*, June 11, 1875, 2 Rettie 775, that "the sound general rule, which may be the subject of exceptions arising from special circumstances, or the special terms of a particular contract, is, that in cases of mutual contract a party in defence is entitled to plead and maintain claims in reduction or extinction of a sum due under his obligation, where such claims arise from the failure of the pursuer to fulfil his part of the contract;" and I may add that any other rule is, in my opinion, likely to lead to injustice being done, and to two litigations where one would frequently be sufficient.

An opinion has been indicated in the case of *Macbride* v. *Hamilton*, and again by some of your Lordships in the present case, that such counter-claims or defences should only be held relevant when founded upon some express provision in the contract. I doubt whether this suggestion affords either a satisfactory or reasonable ground of distinction. Indeed, I think the ground of distinction is not sound. There are many obligations which are not to be found expressly stated in a contract, but which are implied just as plainly as if they had been expressed. I venture to think the sound principle is rather this, that if the defence be founded on an obligation fairly arising out of the contract, and the performance of which is reciprocal to and contemporaneous (viz. exigible or prestable at the same time) with the obligation which is the foundation of the action, then the defence is good. I do not think the question is one of liquid and illiquid claims. The case of *Macbride* v. *Hamilton* is an authority to the contrary. There the articles the price of which was sued for had been manufactured and delivered, and there was no dispute as to the amount of the price. The claim in defence was one of damages of uncertain amount, and entirely disputed, and a proof was allowed in order that the counter-claim might be established. I agree with what your Lordship in the chair said in the case of the *Scottish North-Eastern Coy.* v. *Napier*—"The case of *Tait* v. *M'Intosh* suggests that a counter-claim which may be resolved into a claim of damages may be sustained by way of compensation. If a servant brings a claim for wages, and the answer to that claim is an allegation of the servant's misconduct during the period of the service for which the wages were claimed, that would be a good answer in law to the demand *in toto*." In the case put, where the wages are liquid and the damages illiquid, the counter-claim is accepted as a defence, and properly so where it arises upon the same contract.

So much for the general rule of law, and I now apply it as so stated to this particular case. One specialty to which reference has been made, is that the pursuer remained in the defenders' service for three months longer than he was bound. That does not appear to me to make any difference. I regard that arrangement as in no way different from what frequently happens in the case of leases and contracts of service. These are prolonged on the footing that the agreement which has been in subsistence is to continue in all its stipulations to regulate the relations of parties. It is said that as at the 16th November 1875 the pursuer's claims were liquid, and that the fact of his continuing for three months longer in his employment is the only reason why they were not paid. But I do not think the case can be taken on the footing that if the pursuer had left the defenders' service at the date for which he gave notice this defence would not have been stated. It is only reasonable to suppose the defenders would have made the investigations which disclosed the ground of defence at the date, sooner or later, when the pursuer left their employment.

A second specialty has been referred to—and I do not know how far it enters into the opinions which your Lordships have expressed,—I mean the delays which took place before the amendment was made. The amendment was made, not by way of introducing a new defence, but in terms of the Act of Parliament, which provides that all such amendments as may be necessary "for the purpose of determining in the existing action or proceeding the real question in controversy between the parties" shall be made; and the defenders were subjected to a severe penalty in payment of expenses. The case is just one of the class which the beneficial provision of the statute was intended to meet. The Court are thereby enabled to determine the question in dispute between the parties instead of being obliged to turn one of them out of Court leaving him the remedy of a second action.

What are the claims and counter-claims? The pursuer asks his wages and payment by the defenders for the shares he took under the original agreement. The defenders say, "You misconducted yourself when in our employment, and when you left you did so with a considerable sum of money belonging to us in your hands." It is said that the first of these defences does not arise under any express stipulation of the contract. I do not think it necessary that it should. But if it be necessary, I am of opinion that it does. The pursuer undertook to be the "general manager" of the business of the company, and by the agreements the full control and direction of said business was committed to him. I consider that under this agreement it was quite as much the function of the pursuer as general manager to attend to the mercantile department as to the mechanical part of the business. He was bound to keep the books,—I do not say with his own hands,—but with the assistance which he was entitled to demand from his employers. The defenders say that he undertook to keep the books on a proper system, but failed to do so, and left them in complete confusion. That is a relevant averment, although there is perhaps this point against it, that the defenders did not apparently find fault with him on this subject before he was leaving their employment. The only doubt I have about the relevancy of the averment on this subject is that, seeing the pursuer was so long in the defenders' employment, they ought at an earlier date to have enforced their directions about the books.

But when I come to the other averment of the defenders, I see no reason to doubt it is relevant. They state now in the amended record that there are various sums unaccounted for, and that the pursuer has a sum of not less than £1200 in his hands belonging to them in respect of his intromissions as manager under the agreement. Suppose that the defenders, instead of saying that the pursuer was due them a sum of £1200, had

produced a state showing the various sums due by him, I cannot suppose that this judgment goes so far as to decide that in such a case the pursuer would have a right to decree in the face of such a defence. It seems to me to make the case worse and not better for the pursuer that he left the books in such an incomplete and confused condition that a precise and detailed statement cannot be given.

So far from thinking that it would be an injustice to the pursuer to refuse to give him instant decree, I regard it as a case of injustice to the defenders that, having alleged that the pursuer has £1200 of their money in his hands, they should nevertheless be compelled to pay the sums of smaller amount concluded for as salary and as the price of the shares, and I think there is no rule of law or of pleading which requires that this injustice should be done. I am of opinion that the whole case should be sent to proof.

The Court adhered.

Counsel for Pursuer—Rutherfurd. Agents—Gibson-Craig, Dalziel & Brodies, W.S.

Counsel for Defenders — Asher—Mackintosh. Agents—Morton, Neilson & Smart, W.S.

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*Friday, February 2.*

## SECOND DIVISION.

[Lord Shand, Ordinary.

### HOLMAN AND OTHERS *v.* IRVINE HARBOUR TRUSTEES.

*Reparation — Harbour — Ship—Pilot — Master and Servant.*

Harbour trustees who were by Act of Parliament appointed "a pilotage authority" within the meaning of the "Merchant Shipping Act, 1854," and were empowered to levy pilotage dues to be applied for general harbour expenses, authorised one of their servants (to whom they paid £1, 1s. a week to work in the harbour under the harbour-master) to act as pilot to vessels entering the harbour. The said servant had not been examined, nor was he licensed, as a pilot, and he did not receive any of the pilotage dues. A vessel which he was piloting into the harbour having been damaged through his fault, *held* (*rev.* Lord Shand) that the harbour trustees were liable to the owners of the vessel.

This was an action at the instance of John Holman and others, registered owners of the steamship "Gertrude" of Exeter, against the Irvine Harbour Trustees, and James Dickie, solicitor, Irvine, their clerk, for the sum £267, 14s. 6d., as the loss or damage sustained by the pursuers through the fault of the defenders and their servant in the following circumstances:—On 10th September 1875 the "Gertrude" arrived off the harbour of Irvine. The master, never having been at Irvine before, waited outside the bar for a pilot, and in a short time a boat containing three men came alongside, and one of the men, Jeremiah M'Gill, boarded the vessel, and intimating that he was the pilot took the helm and gave orders to steam ahead. When the vessel was entering the harbour M'Gill steered her too near the south side, and the consequence was that she struck the stone work which supported a beacon, and was damaged to so great an extent that it was necessary to put her into a dry dock for repairs. She was detained in the dry dock eleven days.

The pursuers averred that M'Gill was "acting under the instructions and was in the employment of the defenders," and this action was accordingly brought against the defenders for the loss which pursuers averred they had sustained, viz.:—for repairs, £148, 5s. 6d.; for fees of survey, £8, 8s.; and protest, £1, 1s.; and for eleven days lost, at £10 per diem, £110.

The defenders averred that M'Gill was a duly qualified pilot, and explained that they undertook no responsibility for any damage caused to vessels while under charge of the persons authorised by them to act as pilots.

The pursuers pleaded—"(1) The pursuers having sustained loss and damage through the fault of the defenders and their servant, in causing the vessel to come into collision with rocks or stones on entering the harbour, are entitled to decree for the sums specified in the said account, as concluded for; (2) *Separatim*, the pursuers are entitled to decree, in respect it was the duty of the defenders to keep the fair way of the harbour clear of obstructions."

The defenders pleaded, *inter alia*—"(2) The said Jeremiah M'Gill being a duly qualified pilot, the defenders are not liable; (3) The services of M'Gill having been accepted by the pursuers at their own risk, the defenders are not liable."

A proof was taken, from which it appeared that M'Gill was really a "hobbler," or workman employed by the defenders about the harbour. He had not been examined or formally licensed as a pilot, but as he was understood to know the navigation, he was verbally authorised, as occasion arose, to pilot vessels in. He was not paid by pilot dues, but by weekly wages of 21s. It was clearly proved that the accident was entirely caused by M'Gill. The defenders had under a Provisional Order in 1867 become "a pilotage authority" for the harbour under the Merchant Shipping Act of 1854. In the port of Irvine pilotage was not compulsory, but pilotage dues were payable whether a pilot was employed or not. The pursuers had not been charged pilotage dues. The further result of the proof sufficiently appears from the opinions of the Judges.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 15th November* 1876.—Having considered the cause, Finds that the pursuers have failed to prove facts and circumstances inferring liability against the defenders for the sum sued for or any part thereof; assoilzies the defenders from the conclusions of the action, and decerns.

"*Note.*—The questions of fact in this case do not appear to me to be attended with any difficulty, but the case raises a question of law of considerable importance and nicety. . . . .

"The result is, that the injury to the vessel was caused by the fault of M'Gill, and that the defenders, the Harbour Trustees, were not in